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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 476th MEETING

Held at Headquarters, New York,
on Friday, 8 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 18 (continued)

1. The CHAIRMAN said that paragraph (3) of article 18 was a provision that was commonly included in the general clauses of conventions that were applicable to States with various territorial jurisdictions. The Commission had already taken the position that branches and separate offices of a bank in different States were separate banks.

2. Mr. DASTIS (Spain) said that paragraph (3) (a) was too general; instead of referring to territorial units having "different rules of law", it should refer to different regulations in respect of credit transfers. In Spain there were territorial units which had different regulations in many areas of law but the same commercial law.

3. The CHAIRMAN pointed out that if the Commission amended paragraph (3) (a), it would be departing from the language normally used in conventions.

4. Mr. GREGORY (United Kingdom) said that since paragraph (3) began with the words "For the purposes of this article", the provision was relevant only where there was a conflict of laws. If the law relating to credit transfers was the same in two territorial units of a State, the provision did not apply. If the Spanish amendment was adopted, it would not be clear what the rules of law governing credit transfers were, since they would include both the provisions of the Model Law and also other rules of law that were relevant to credit transfers.

5. The CHAIRMAN suggested that the Drafting Group should consider the suggestion made by the representative of Spain.

Outstanding issues

6. The CHAIRMAN said that at its twenty-fourth session, the Commission had left three issues pending. The first issue, referred to in paragraph 84 of the report of that session (A/46/17), concerned the definition of the term "beneficiary's bank". It was his view that the Commission's discussions had shown that a definition was unnecessary. If he heard no objection, therefore, he would take it that that was the view of the Commission.

7. It was so decided.

8. Mr. CHATURVEDI (India) said his delegation felt that the absence of a definition of the term "beneficiary's bank" could create some problems, especially in relation to article 7 and other articles concerning the

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discharge of the obligation of the sender or the originator. The Commission should put it on record that problems could arise in respect of implementation.

9. The CHAIRMAN said that the second issue, referred to in paragraph 222 of the report, was the possible insertion of a general provision along the lines of article 7 (2) of the United Nations Convention on Contracts for the International Sale of Goods. The wording of the general provision would be:

> "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

The wording would be adjusted, as required.

10. Mr. BURMAN (United States of America) said his delegation felt that the general provision would work just as well in a model law as in a convention and would provide useful guidance for courts in producing decisions that would support the overall purpose of the Model Law.

11. Mr. DE BOER (Observer for the Netherlands) said that it was appropriate to include the general provision in the Model Law, since the Model Law could be applied by courts in the absence of statutory law.

12. Mr. PELICHET (Observer, The Hague Convention on Private International Law) disagreed that the proposed general provision had a place in the Model Law. The Model Law would always be applied as the law of any State that incorporated it into its system; if there were lacunae in the Model Law, they would be filled by national law.

13. Mr. HERRMANN (Secretary of the Commission) said that since the general provision was taken from a convention, it would have to be adjusted for the purposes of the Model Law. There was no need for a court to invoke a conflict-of-laws rule when considering matters governed by the Model Law but not expressly regulated by it. If a question was not expressly addressed in the Model Law, an attempt should be made to find an answer in the principles of the Model Law before referring to other parts of the national legal system.

14. Mr. CHATURVEDI (India) said that it was unnecessary to include the general provision in the Model Law: where there was a point of dispute, courts should look at the laws and judicial decisions of other countries, as was the general practice.

15. Mr. EL-SHARKAWY (Egypt) said that he supported the inclusion of the general provision in article 18.

16. Mr. LIM (Singapore) said that at the previous session he had opposed the inclusion of the general provision. However, since then he had studied the application of UNCITRAL arbitration law in various parts of the world and had concluded that a provision regarding interpretation would be very useful.

17. Mr. CRAWFORD (Canada) said that it was very difficult to make a last-minute change in article 18; the new provision could be interpreted in ways that were completely foreign to his own legal system and would give the Model Law a much broader scope of application.

18. The CHAIRMAN observed that the proposal had been made at the previous session.

19. Mr. GRIFFITH (Observer for Australia) said that, as the Commission had a satisfactory text, there was a danger in introducing a general provision at the last minute.

20. Mr. GREGORY (United Kingdom) suggested that the Commission should consider deleting the words after the phrase "on which it is based".

21. Mr. DE BOER (Observer for the Netherlands) suggested that the question should be referred to the Drafting Group.

Suggestions by the Secretariat for the final review of the draft Model Law (A/CN.9/SR.367)

22. Mr. BERGSTEN (Consultant to the Secretariat) briefly introduced document A/CN.9/SR.367, containing the Secretariat's suggestions for the final review. In general, the points raised in the document were either drafting matters or relatively minor policy questions, such as the definition of "banking day" in paragraph 22.

23. The CHAIRMAN suggested that such minor questions should be sent to the Drafting Group. The Commission might then proceed to consider substantive questions.

24. Mr. HARRIS (Observer, Commission of the European Communities) said that the value date, which had not yet been discussed as a general point, could not be considered a drafting point. The Chairman should seek the permission of the Commission before referring the matter to the Drafting Group.

25. Mr. BERGSTEN (Consultant to the Secretariat) suggested that the Commission might consider the problem of the applicability of article 10 to the beneficiary's bank. The definition of the term "execution", which was still enclosed in square brackets, also referred to the beneficiary's bank, but the latter term was not defined. The most significant aspect of paragraph (1) of article 10 was the deemed-acceptance rule, and a clear decision was needed on whether that rule did or did not apply to the beneficiary's bank.

26. Mr. GREGORY (United Kingdom) said that the rule applied to the beneficiary's bank. There was no need to define execution in the context of the beneficiary's bank; the text was correct as it stood. The definition of execution referred only to banks other than the beneficiary's bank, so "execution" had its ordinary meaning in paragraph (1) with respect to the beneficiary's bank.

27. It was legitimate to include the beneficiary's bank under paragraph (1), which meant that the beneficiary's bank was required to execute the payment order on the same day or the following day. Precise stipulations, however, should be left to the local law to determine. With regard to paragraphs (1 bis) and (1 ter), the Commission ought to consider when value was to be given by the beneficiary's bank.

28. Mr. BHALA (United States of America) said that the definition of "execution" in article 2 (1) should be retained without square brackets. With regard to the execution of a payment order by the beneficiary's bank, his delegation thought that such an order could be accepted, but not executed, by that bank. Accordingly, the word "executed" in article 9 (2) and (5), which dealt with the obligations of the beneficiary's bank, might better be changed to "accepted". It might also be advisable to delete the phrase "within the time required for execution under article 10" from article 9 (5), in which case the time required would be governed by local law.

29. Ms. KOSKELO (Observer for Finland) agreed that article 10 (1) was applicable to the beneficiary's bank. If the beneficiary's bank did not accept the payment order in accordance with the other rules of article 8 by crediting the beneficiary's account, it ought to be possible to determine when the beneficiary's bank should have acted. It was also necessary to know when the transaction had been completed for the purposes of article 16.

30. Mr. CHATURVEDI (India) said that his delegation supported the position of the United Kingdom with regard to article 10 (1), on the understanding that the text as revised by the Drafting Group would be circulated to the members of the Commission.

31. Mr. LE GUEN (France) pointed out that article 10 (1) as currently drafted stipulated that a receiving bank was required to execute a payment order. The definition of a receiving bank given in article 2 (g) did not exclude the beneficiary's bank, a fact which was clear from the wording of other provisions such as article 11 (5), which referred to "a receiving bank other than the beneficiary's bank". Since article 10 (1) did not specifically exclude the beneficiary's bank, it was clear that the provision must apply to that bank. He therefore fully agreed with the remarks made by the representative of the United Kingdom.

32. To adopt the text proposed by the Secretariat and delete the words in square brackets would radically change the paragraph in question. Consequently, the square brackets should be deleted and the words inside retained.

33. Mr. FELSENFELD (United States of America) said that the application of article 10 to the beneficiary's bank created an unwarranted inconsistency in the Model Law. Articles 8 and 9 already specified clearly what the beneficiary's bank was required to do, and it was neither necessary nor appropriate to apply article 10, which referred to "execution", a term totally inapposite with regard to the beneficiary's bank.

34. Mr. CRAWFORD (Canada) said that he would agree with the remarks made by the representative of the United States of America if he could be fully satisfied that there was a duty on the beneficiary's bank to accept or reject the payment order within a specified period of time. One of the main objectives of the Commission's work was to improve the response of the international banking system, and it was essential that there should be a clear duty on banks to react upon receipt of a payment order. However, the Secretariat's proposal to delete the concept of deemed acceptance would create a disturbing situation where, although the funds were in the beneficiary's bank, the bank had no duty to act. If article 10 was not applied to the beneficiary's bank, the efforts to ensure a timely response by all banks participating in the transfer would be in jeopardy.

35. Mr. JONES (United Kingdom) agreed that it was essential that the beneficiary's bank should have a duty to act. With regard to the term "execution", the definition contained in article 2 of the Model Law referred specifically to receiving banks other than the beneficiary's bank. The question of execution in relation to the beneficiary's bank should be dealt with in accordance with local law, particularly as the Commission had already agreed that the relationship between the beneficiary's bank and the beneficiary fell outside the terms of the Model Law.

36. Mr. SONO (Observer, International Monetary Fund) said that the Working Group had left the term "execution" in square brackets throughout the text because it had not been sure whether the term should apply to the beneficiary's bank. It had been agreed that article 2 (1) could be deleted if, after discussion of articles 8 and 10, it was found that there was no problem in using the term "execution" in relation to the beneficiary's bank. However, some uncertainty had remained in the Drafting Group, and it had been decided to retain the square brackets. Nevertheless, in using the term "execution" in the discussion of articles 8 and 10, the Drafting Group had been aware that the term applied also to the beneficiary's bank, in that the latter was also a receiving bank. To attempt to discuss at the present stage whether or not article 10 (1) was applicable to the beneficiary's bank was therefore tantamount to reopening an issue which had already been decided.

37. The CHAIRMAN said that the most appropriate solution would be to remove the square brackets, since they did not correspond to any decision taken by the Commission.

38. Mr. BERGSTEN (Consultant to the Secretariat) drew attention to paragraphs (1 bis) and (1 ter) and said that they should be considered together, as they dealt with the same problem - namely the question of the day as of which a bank must give value to its credit party. Paragraph (1 ter) was quite clearly a deemed-acceptance situation and provided a specific rule governing the value date for a credit party other than the beneficiary's bank. It had not been extended to apply to the beneficiary's bank because it had not been thought appropriate to specify a value date to the beneficiary. Paragraph (1 bis) did apply to the beneficiary's bank, because it was dependent on paragraph (1).

39. However, if paragraph (1 ter) was not to apply to the beneficiary's bank, then neither should paragraph (1 bis). He did not understand why one value-date rule should apply to the beneficiary's bank and the other should not.

40. Mrs. FLINT (United Kingdom), supported by Mr. FELSENFELD (United States of America), said that neither paragraph (1 bis) nor paragraph (1 ter) should apply to the beneficiary's bank.

41. Mr. CHATURVEDI (India) said that paragraphs (1 bis) and (1 ter) should apply to the beneficiary's bank.

42. The CHAIRMAN said that to apply the paragraphs in question to the beneficiary's bank would clearly run counter to the policy adopted by the Working Group and the Commission throughout the drafting of the Model Law.

43. Mr. SCHNEIDER (Germany) said that for his delegation it was clear that paragraphs (1) and (1 bis) did apply to the beneficiary's bank. He was surprised that the Commission should be reopening policy discussions at the current stage.

44. Mr. BERGSTEN (Consultant to the Secretariat) said that, according to the decisions taken, paragraphs (1) and (1 bis) applied to the beneficiary's bank but paragraph (1 ter) did not. The scope of paragraph (2) was clear, since it referred to articles 7 and 9, and paragraphs (4), (5) and (6) should fall into place without any need for discussion.

45. Mr. GREGORY (United Kingdom) questioned the advisability of allowing the inconsistency between paragraphs (1 bis) and (1 ter) to remain. He was not convinced that a policy decision had been taken at the previous session.

46. Mr. DE BOER (Observer for the Netherlands) said that paragraphs (1 bis) and (1 ter) could either both apply to the beneficiary's bank or both exclude it, but to leave the discrepancy between them was very peculiar.

47. Mr. BERGSTEN (Consultant to the Secretariat) said that the problem of time-limits within the context of deemed acceptance was a difficult one, and the Secretariat had not attempted to put forward a solution. Nevertheless, a simple drafting change might resolve the problem, and that was to delete the

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deemed-acceptance rule and rely on the definition of payment contained in article 5. However, he recognized that a policy change was implied which might not be acceptable to some delegations.

48. Mr. GREGORY (United Kingdom) said that the proposal raised substantive questions of policy which could not be discussed at the current stage. In any case, such a radical solution was not really necessary: the current provisions were unsatisfactory only in terms of their drafting and not in the way in which the substantive rules operated. He felt that the Commission could recognize that a problem existed but agree not to address it.

49. Mr. BHALA (United States of America) said that he agreed with the remarks made by the Consultant to the Secretariat. However, although he understood the reasons for wanting to delete the deemed-acceptance rule, it was rather late for such a radical amendment of the text. In order to achieve the same goal, it might be possible to delete articles 6 (2) (e) and 8 (1) (h), and either amend article 8 (1) (c) or insert a new article 8 (1) (h) reading "when the beneficiary's bank has been paid by its sender". While some delegations might then wonder whether article 6 (3) and article 8 (2) should not also be deleted, those provisions should be retained because they obliged the receiving bank to give notice of rejection.

50. Mr. CHATURVEDI (India) agreed with the Consultant to the Secretariat that the concept of deemed acceptance should be deleted. However, the questions concerned were substantive ones and should not be left to the Drafting Group.

51. Mr. LE GUEN (France) said that, if his understanding was correct, the United States was proposing to replace deemed acceptance with payment, since payment was deemed to have been accepted by a receiving bank when it was received. Under article 5, however, payment did not depend on action by the receiving bank, but took place on the initiative of the sending bank. While acceptance usually required an action by the party receiving payment, the concept of deemed acceptance implied that acceptance resulted from non-action by the receiving bank. That would seriously undermine the concept of acceptance, which was crucial to the Model Law.

52. Mr. BERGSTEN (Consultant to the Secretariat) said that, under the United States proposal, there was only one situation in which a receiving bank would not have an opportunity to reject a payment prior to receiving it and thus accepting it: namely, when it received credit with a central bank. Under article 5 (b) (iv), if a bank received a payment order during the day and wished to reject it, it could do so until such time as there was settlement of the net amount, usually at the close of the business day.

53. Mr. SCHNEIDER (Germany) said that, as his delegation attached importance to the principle that a bank should have the opportunity to reject a payment order, it opposed the United States proposal and supported the statement made by the representative of France.

54. The CHAIRMAN said that it was improper to reopen debate on an issue on which the Commission had already taken a decision; accordingly, he suggested that the text should remain as it stood.

55. Mr. LE GUEN (France), referring to the question of the automatic conversions of currencies by receiving banks in implementing credit transfers, said his delegation had supported a proposal at the twenty-fourth session to add to article 7 (2) a provision requiring the receiving bank to execute the transfer in the currency stipulated by the sender. That proposal had been rejected on the grounds that protection against the practice of automatically converting currencies was already implicit in the wording of that paragraph. The issue, however, was of great importance in Europe, where there were plans to adopt a single European currency. In the future, banks might be required to convert payment orders into, for example, both French francs and European Currency Units (ECUs). In such cases, banks should be given the option of rejecting a payment order.

56. Mr. HARRIS (Observer, Commission of the European Communities) said that the current discussion was similar to the one which had arisen in the context of article 17 (2), where there was a possibility that a beneficiary might receive an amount less than the amount indicated in the payment order. UNCITRAL had dealt with that issue by deciding that the payment order would none the less be deemed to be complete. Banks did, in fact, make currency conversions, and it was important to avoid laying down a rigid rule on the subject. Originators sometimes specified in their payment orders that the conversion was to be made by their bank or by an intermediary bank farther down the chain; on the other hand, banks were sometimes required to make that decision. In any case, the Commission of the European Communities preferred for the matter to be dealt with as part of a rule governing the manner in which the payment order issued was made consistent with the payment order received.

57. Mr. CHATURVEDI (India) said his delegation felt that the payment order should be accepted and executed in the currency specified by the originator.

58. Mr. LE GUEN (France) proposed that the following phrase should be inserted in article 7 (2) after the words "in an appropriate manner": "and in the currency stipulated in the payment order received by the receiving bank".

59. Mr. OPAGOS (Observer for Romania) proposed that the following clause should be inserted after the second sentence of article 18 (1): "However, the law of the State of the receiving bank shall be of secondary or lesser application, and shall apply only in order to supplement the Model Law where and to the extent that the law of the State of the receiving bank shall be the most favourable to the beneficiary of the transfer".

60. The CHAIRMAN recalled that the Commission had decided to include article 18 in a footnote.

61. Mr. BURMAN (United States of America) said that, as the Commission had decided at its previous session that the rules governing the revocation of a payment order would apply also to the amendment of a payment order (article 11 (8 bis)), the Commission should add similar wording to articles 2 (j) and 4 (1) and (2) for the sake of consistency.

62. Mr. CRAWFORD (Canada) said that the proposal should be referred to the Drafting Group.

63. Mr. GREGORY (United Kingdom) said that in principle, he agreed with the Canadian representative.

64. Mr. CHATURVEDI (India) sought assurance that the proposal did not involve any substantive changes in the text.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the United States proposal to the Drafting Group.

66. It was so decided.

67. Mr. FUJISHITA (Japan) said that he wished to place on record his delegation's concern at the provision in article 4 (2) which excluded an authentication procedure commonly applied in his country, namely, the comparison of a signature and a seal. His delegation believed that the national law of each State should apply with regard to authentication procedures.

The meeting rose at 6 p.m.